FILE COPY

Office Supreme Court, U.S.
FILED
APR 12 1961
JAMES R. BROWNING, Clerk

PETITION NOT PRINTED
IN THE

Supreme Court of the United States

October Term, 1960
No. 187

ELIZABETH ANN DUNCAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF.

STANLEY MOSK,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
BRUCE A. THOMPSON,
District Attorney,
County of Ventura,
600 State Building,
Los Angeles 12, California,
Attorneys for Respondent.

ROY A. GUSTAFSON,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Introduction 1

Argument 2

I.

Was petitioner's right to the trial guaranteed by the due process clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held? 2

A. The sole question concerning newspaper articles is their effect on persons exposed to them, not whether they accurately report the facts 4

B. The newspaper publications were not such as to cause every person who read them to become legally biased 6

1. The reported facts of the crime 6

2. The reported remarks of the District Attorney 9

C. Assuming that some published report would cause every reader to become legally biased, there is no proof that any juror who served read that report 13

D. Assuming that at least one juror became legally biased by what he read, there is no proof that he retained that bias at the time of trial 16

E. Two California courts held that the published reports would make it impossible to obtain a fair jury 17

F. Petitioner at the trial did not believe that any juror was legally biased 19

G. Summary 20

PAGE

II.

Was there a violation of petitioner's right to a fair trial, as guaranteed by the due process clause of the XIV Amendment of the Constitution of the United States of America, where in a trial of a capital offense by jury, the trial court permitted to remain in the jury box and sit in judgment, three jurors who had entered the jury box with fixed opinions as to petitioner's guilt, and retained such opinions while being examined on voir dire? 27

A. The question as to the bias of the three jurors was never raised below and therefore is not properly before this court 28

B. The jurors who actually tried the cause were impartial and unbiased 35

C. The denial of the challenges for cause of four prospective jurors who were later removed from the jury gives rise to no constitutional question 43

Conclusion 48

Appendices:

Appendix A. Newspaper exhibits—reports of out-of-court statements purportedly made by counsel for defendants to newspaper reporters ..... App. p. 1

Appendix B. Statements by defense attorneys to newspapers ..... App. p. 4

TABLE OF AUTHORITIES CITED

CASES	PAGE
Brown v. Massachusetts, 144 U. S. 573, 36 L. Ed. 546, 12 S. Ct. 757	34
Buchalter v. People of the State of New York, 319 U. S. 427, 87 L. Ed. 1492, 63 S. Ct. 1129	46
Burns v. State, 145 Wis. 373, 128 N. W. 987	36
Chapman v. People, 338 U. S. 943, 94 L. Ed. 581, 70 S. Ct. 423	15
Commonwealth v. Richardson, 392 Pa. 528, 140 A. 2d 828	36
Commonwealth v. Snyder, 282 Mass. 401, 185 N. E. 376, aff'd 291 U. S. 97	36
Dolan v. United States, 116 Fed. 578	37
Edelman v. California, 344 U. S. 357, 97 L. Ed. 387, 73 S. Ct. 293	34
Fleming v. State, 62 Okla. Crim. 446, 72 P. 2d 403	36
Garlitz v. State, 18 Atl. 39, 71 Md. 293	36
Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794	34
Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2	23, 37, 38, 40, 42, 4
Hopt v. Utah, 120 U. S. 430, 30 L. Ed. 708, 7 S. Ct. 614	37, 38, 40, 46
Hoyt v. United States, 273 Fed. 792	37
Irvin v. Dowd, 271 F. 2d 552 cert. grant. 4 L. Ed. 2d 642	23, 38, 46
Johnson v. State, 209 Ga. 333, 72 S. E. 2d 291	36
Kansas v. Kornstett, 62 Kan. 221, 61 P. 805	36
Marshall v. United States, 360 U. S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171	26
McCue v. Commonwealth, 103 Va. 870, 49 S. E. 623	36
Merritt v. United States, 264 Fed. 870	37

PAGE

Parker v. Illinois, 333 U. S. 571, 92 L. Ed. 886, 68 S. Ct. 708 34
People v. Burwell, 44 Cal. 2d 16, 279 P. 2d 744 17
People v. Chapman, 93 Cal. App. 2d 365, 209 P. 2d 121 15
People v. Cook, 39 Cal. 2d 496, 247 P. 2d 567 16
People v. Cross, 64 Cal. App. 443, 221 Pac. 684 29
People v. Darby, 114 Cal. 2d 412, 250 P. 2d 743 7
People v. Duncan, 53 Cal. 2d 803, 350 P. 2d 103 ..... 3, 18, 41, 45, 48
People v. Goldenson, 76 Cal. 328, 19 Pac. 161 17
People v. Hall, 220 Cal. 166, 30 P. 2d 23 17
People v. Kerr, 113 Cal. App. 2d 90, 247 P. 2d 927 ..... 29, 30
People v. Marconi, 118 Cal. App. 683, 5 P. 2d 974 29
People v. McKay, 37 Cal. 2d 792, 236 P. 2d 145 18
People v. Meehan, 124 Cal. App. 2d 589, 269 P. 2d 70 29
People v. Mendes, 35 Cal. 2d 537, 219 P. 2d 1 17
People v. Potigian, 69 Cal. App. 257, 231 Pac. 593 43
People v. Sanford, 43 Cal. 29 ..... 29, 30
People v. Stonecifer, 6 Cal. 405 29
People v. Suniga, 128 Cal. App. 2d 738, 275 P. 2d 914 17
People v. Yeager, 794 Cal. 452, 229 Pac. 40 17
People v. Young, 21 Cal. App. 2d 423, 69 P. 2d 203 29
Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 ..... 31, 36, 37, 46
Sneed v. State, 47 Ark. 180, 1 S. W. 68 36
Spies, Ex parte, 123 U. S. 131, 31 L. Ed. 80, 8 S. Ct. 21 38
State v. Anderson, 33 N. W. 2d 1 36
State v. Hamilton, 155 La. 1069, 99 So. 874 40
State v. Howard, 17 N. H. 171 36
State v. Laudano, 74 Conn. 638, 51 Atl. 860 36
State v. Meyer, 58 Vt. 453, 3 Atl. 195 36
State v. Mittle, 120 S. C. 526, 113 S. E. 335 36

PAGE

State v. Rodriguez, 23 N. M. 156, 167 Pac. 426 36
State v. Spencer, 21 N. J. L. 196 36
State v. Toney, 98 W. Va. 236, 127 S. E. 35 36
State v. Winder, 183 N. C. 776, 111 S. E. 530 36
Stembridge v. Georgia, 343 U. S. 541, 96 L. Ed. 1130, 72 S. Ct. 834 34
Stroble v. California, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 20
Territory of Hawaii v. Robello, 20 Hawaii 7 36
Thiede v. Utah, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62 37
United States v. Handy, 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965 ..... 21, 42
United States v. Titus, 210 F. 2d 210 ..... 27, 37, 40
Willingham v. Alabama, 262 Ala. 550, 80 So. 2d 280 36

DICTIONARY

Webster's International Dictionary 27

MISCELLANEOUS

Coronet Magazine, January 1960, p. 136 10

STATUTES

Alaska Compiled Laws Ann. (1949), Sec. 55-7-48 36
Arizona Rules of Criminal Procedure, Rule 220 36
California Penal Code, Sec. 1033 17
California Penal Code, Sec. 1035 17
California Penal Code, Sec. 1068 29
California Penal Code, Sec. 1073 19
California Penal Code, Sec. 1076 ..... 30, 35, 44
Colorado Revised Statutes Ann. (1953), Chap. 78-5-3 36
Florida Statutes Ann. (1941), Sec. 913.03(10) 36
Illinois Revised Statutes (1959), Chap. 78, Sec. 14 36
Indiana Statutes Ann. (1956), Sec. 9-1504 36
Kentucky Criminal Code (1959), Sec. 209 36

PAGE

Louisiana Revised Statutes (1950), Sec. 351(1) 36
Michigan Statutes Ann. (1954), Sec. 28.1033 36
Mississippi Code Ann. (1942), Sec. 1763 36
Missouri Revised Statutes (1949), Sec. 546-150 26
Montana Revised Code Ann. (1947), Tit. 94-7122 36
Nebraska Revised Statutes (1943), Sec. 25-1636 36
Nevada Revised States (1959), Chap. 175.115(2) 36
New York Code of Criminal Procedure, Sec. 376(2) 36
North Dakota Revised Code (1943), Tit. 29-1738 36
Ohio Revised Statutes Ann. (Page 1954), Sec. 2945.25(B) 36
Oregon Revised Statutes (1959), Sec. 17.145 36
South Dakota Code (Supp. 1960), Tit. 34.3620 36
Tennessee Code Ann. (1956), Sec. 40-2507 36
Texas Code of Criminal Procedure Art. 616(13), 632 36
Utah Code Ann. (1953), Tit. 77-30-21 36
Washington Revised Code (1959), Tit. 10.49.040 (which refers to Tit. 4.44.190) 36
Wyoming Statutes (1957), Sec. 7-225 36
United States Constitution, Fifth Amendment 26
United States Constitution, Fourteenth Amendment 26

TEXTBOOKS

31 American Jurisprudence (1958), Sec. 212 27
34 California State Bar Journal (1959), p. 859 12
Philips, Felix Frankfurter Reminisces (1960), p. 169 15
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland, 1951 Ed.), Sec. 66 34
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland, 1951 Ed.), Sec. 70 34
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland, 1951 Ed.), Sec. 75 34
Stern & Gressman, Supreme Court Practice (2d Ed. 1954) 34

IN THE

Supreme Court of the United States

October Term, 1960

No. 187

ELIZABETH ANN DUNCAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF.

Introduction.

Petitioner's approach is similar to the approach of petitioner Baldonado and the comments in respondent's brief in that case under "Introduction" are applicable here. They will not be repeated.

There are two questions, as respondent understands this Court's order, and respondent does not intend to argue matters not before this Court.

ARGUMENT.

I.

Was Petitioner's Right to the Trial Guaranteed by the Due Process Clause of the XIV Amendment Violated in View of the Conduct of the District Attorney, the Resulting Publicity, and the Other Circumstances Under Which the Trial Was Held?

Respondent understands that the sole point posed by the Court's question is whether by holding petitioner's trial before a jury in Ventura County on February 16, 1959, California deprived petitioner of a fair trial. Petitioner claims that it was impossible for her to be fairly tried before a jury at that time and place because of the newspaper publicity regarding the case.

On November 13, 1958, petitioner employed co-defendants Moya and Baldonado to murder her daughter-in-law, Olga Duncan. Moya and Baldonado did so on November 17, 1958, and subsequently received some of the money which they were promised for committing the murder. Petitioner was brought to trial three months later for the crime of murder. Under California law the first phase of the trial was concerned with whether or not petitioner was guilty of first degree murder, that being the only crime of which she could be convicted under the evidence. (Neither second degree murder nor manslaughter was involved. Petitioner was guilty of first degree murder or nothing.) If petitioner were convicted, the jury would have a further question of whether her penalty should be death or life imprisonment. The third phase of the trial (if petitioner were convicted and regardless of what the penalty

might be) would be whether petitioner was insane at the time she committed the crime.

After a lengthy trial, petitioner on March 16, 1959, was found guilty of first degree murder by the jury. There followed a trial on the issue of penalty after which, on March 20, 1959, the jury fixed her penalty at death. A jury having been waived on the issue of sanity, the matter was submitted to the court on March 24, 1959, and the court found that defendant was sane at the time of the commission of the crime.

Petitioner, in her appeal to the California Supreme Court, alleged that numerous errors occurred during the judicial proceedings against her. That court found that there were no prejudicial errors. It unanimously affirmed the judgment. *People v. Duncan,* 53 Cal. 2d 803, 350 P. 2d 103 (1960). Respondent understands that this Court's order on granting certiorari eliminated any question of the propriety of the trial judge's rulings during the course of the judicial proceedings (except insofar as jurors with opinions were "permitted" to serve, a matter treated separately under the second question posed by this Court). Thus the issue is confined to whether facts and circumstances outside of the judicial proceedings and prior to the trial deprived petitioner of a fair trial. There is no showing that any fact or circumstance occurred outside the judicial proceeding except the publication of the newspaper articles which were submitted as exhibits to an application for change of venue. Consequently, the narrow issue is whether the pre-trial publications prevented the selection of a fair and impartial jury.

A. The Sole Question Concerning Newspaper Articles Is Their Effect on Persons Exposed to Them, Not Whether They Accurately Report the Facts.

Suppose a newspaper published a story that the judges of the county held a meeting and unanimously declared that they hoped and expected that every person called as a juror for petitioner's case would vote for a verdict of first degree murder. No such meeting was held and no such statement made by any judge. Nevertheless, if the effect of reading the article was such that the reader thereafter could not fairly try petitioner, the fact that the story was wholly false would not make trial by such a person (as a juror) any less unfair.

In this connection it should be noted that the out-of-court conduct of the District Attorney is not properly in question here, nor was it in the courts below. When petitioner made an application for change of venue on the date the trial began [Tr. of R. p. 24], she incorporated by reference the affidavits theretofore filed on January 13, 1959, by co-defendant Moya to which were attached as exhibits certain newspapers. In addition petitioner submitted clippings from the Ventura Star-Free Press of January 12, 15, 20, 29, 30 and 31, 1959, and from the Oxnard Press Courier of January 13, 15, 19, 20 and 29, 1959, and February 2, 1959. The question before the judge was whether (assuming all prospective jurors would have read the articles) the effect on every reader would be that he would be unable to fairly try petitioner on the issues of guilt, penalty and sanity. Where an article purported to relate a statement by the District Attorney, the judge was not concerned with whether the District Attorney ac-

tually made such a statement or with whether it was true, but with whether the effect on prospective jurors was such that they would necessarily become and remain irremediably biased against petitioner.

While it is true that the then District Attorney, who is one of counsel on this brief, did not file an affidavit denying the making of those statements (among those attributed to him in the newspaper exhibits) which were in fact not made by him, there is a good reason for this. Whether the District Attorney made any or all of the statements attributed to him was not in issue. If a prospective juror read an article quoting the District Attorney as having said something which he actually did not say, the effect on the prospective juror would be no less if the District Attorney filed an affidavit in court denying that he made the statement.

Moreover, the out-of-court conduct of the District Attorney cannot be proved by newspaper articles attached as exhibits to an affidavit supporting a motion for change of venue. The fact that a newspaper says that the District Attorney made a certain statement is not proof that the statement was made. It is the rankest kind of hearsay. The California Supreme Court recognized this fact and carefully used such phrases as "an article quoted the district attorney as saying," as "an article quoted the district attorney at length," and as "the district attorney was reported to have made" certain statements. The California Supreme Court did not say, and it could not say, that the District Attorney did in fact make those statements because there was no proof that he did (except insofar as he admitted making one statement in his own affidavit). To emphasize the point that there was no proof of the out-

of-court conduct of the District Attorney, the California Supreme Court noted that at oral argument "the district attorney denied making most of the statements attributed to him." The California Supreme Court, in other words, recognized, as did the trial court and counsel, that the purpose of the exhibits was to determine whether all prospective jurors who might have read them would have become legally biased and not to determine whether what the articles said was true.

Respondent has treated this point at length because petitioner sought certiorari on the claim that the articles were proof of the facts stated therein and because this Court, in its order of June 27, 1960, seemed to accept this view when it asked whether "the conduct of the District Attorney" violated petitioner's right to a fair trial.

B. The Newspaper Publications Were Not Such as to Cause Every Person Who Read Them to Become Legally Biased.

Since there is nothing in the record to indicate that any particular juror actually did not act fairly and impartially, any conclusion that a juror did not so act must necessarily be based on the premise that because of the newspaper publications the juror *could not* (and therefore the juror *did not)* act fairly and impartially.

For convenience in discussing this point, respondent has divided the publications into two categories which will be separately discussed.

1. *The Reported Facts of the Crime.*

Olga Duncan, a pretty, young Santa Barbara nurse who was the wife of petitioner's attorney son, disap-

peared on November 17, 1958. She was pregnant and there soon began to be news stories about her disappearance. By the middle of December, interest in the case had spread beyond Santa Barbara County. Los Angeles newspapers carried stories about the matter and newspapers in Ventura County likewise did. At this time there was no indication that Ventura County had anything to do with the case. Then on December 13, 1958, petitioner was arrested and charged in Ventura County with having perpetrated a fraud on the court in obtaining a judgment which purported to annul the marriage between Olga Duncan and petitioner's son, Frank. [Tr. of R. p. 139.] Petitioner was subsequently convicted on this charge and is now serving an indeterminate sentence of one to fourteen years in prison. On December 21, 1958, petitioner's co-defendant Baldonado, who was then awaiting sentence in Ventura County on another charge, confessed that he murdered Olga Duncan on November 17, 1958, and buried her in Ventura County. This was reported in the newspapers on December 22, 1958. On December 26, 1958, the newspapers reported that petitioner's co-defendant Moya also confessed the murder. Both Moya and Baldonado in their confessions stated that petitioner had employed them to murder Olga Duncan.

After the transcript of the grand jury hearing was filed, it became a public record *People v. Darby*, 114 Cal. App. 2d 412, 250 P. 2d 743 (1952), and the newspapers quoted at length from the testimony, particularly that given by co-defendants Moya and Baldonado. Petitioner did not appear as a witness before the grand jury hearing. As this Court will note from the newspaper exhibits, petitioner was repeatedly quoted as deny-

ing that she ever employed Moya or Baldonado to murder Olga Duncan.

So far as the facts of the crime are concerned, any person who regularly read the newspapers could not help but conclude that Olga Duncan was dead and that Moya and Baldonado murdered her. Such a person would also know that Moya and Baldonado claimed that petitioner hired them to commit the murder and that petitioner denied that Moya and Baldonado were hired by her to commit the murder. The first question then is whether each and every person who read the newspaper articles relied upon by petitioner would necessarily be of such frame of mind that he could not, if called as a juror, fairly and impartially decide the issues in the case to be tried against petitioner.

Respondent believes that the answer to the question can be supplied only by the subjective reactions of the members of this Court after reading the limited number of exhibits applicable to petitioner's case.

If a member of this Court can read the articles without concluding that if he were to try the case, he would find petitioner guilty of first degree murder regardless of what the evidence might be, then petitioner's right to a fair trial was not infringed.[1] This is so for the

---

[1]The converse is not true. If a member of this Court upon reading the newspapers feels that he would thereafter be unable to fairly try the case, it does not mean that all persons would have similar reactions. Before concluding that petitioner was deprived of a fair trial, it would be necessary to find that (1) all persons would necessarily be affected in the same manner as the Justice, (2) at least one juror read the matter deemed offensive, (3) the reaction continued to exist from the time of reading to the time of trial, (4) the juror in stating that he could try the case fairly was incorrect in his conclusion and (5) petitioner may raise the point in this Court even though at the trial she did not challenge any juror on the ground of bias.

reason that nothing in the record indicates that any of the twelve jurors had any *fixed* opinion from any source as to whether petitioner was guilty and nothing indicates that any juror was less capable of deciding the guilt or innocence of petitioner on the evidence than a member of this Court would be. On the contrary, the twelve jurors all declared that they would decide the case solely on the evidence and petitioner accepted these declarations because she did not challenge a single juror who served.

Respondent submits that a reading of the exhibits would not leave every reader in the frame of mind that petitioner should be found guilty regardless of whatever evidence might be presented in court.

2. *The Reported Remarks of the District Attorney.*

The District Attorney is quoted in the Ventura County Star-Free Press of December 22, 1958, and the Oxnard Press Courier of December 24, 1958, as being in favor of the retention of the death penalty in California. Petitioner claims that the article was a demand by the District Attorney that petitioner be executed and that the story necessarily would influence every reader against petitioner.

In the first place, the statement on its face shows that it was concerned with contemplated legislation, not with the trial of petitioner's case. That the reporter of the Ventura County Star-Free Press considered it as such is illustrated by the opening sentence of the story: "District Attorney Roy Gustafson saw the Duncan murder as reason for a continuation of California's death penalty." The headline writer saw it in the same light because the headline reads: "D. A.

Urges Death Term in Killings." There was only *one* killing involved in the instant case. The plural word "Killings" clearly indicates that the statement related to the retention of capital punishment for murders in general and not for this particular murder alone. There was nothing unusual in the District Attorney's public statement on this subject because he had often been quoted in his appearances before the California Legislature in opposition to the repeal of capital punishment. (See, for his most recent testimony, Report of the California Senate Committee on Judiciary, March 9, 1960. Copies lodged with Clerk.). In fact, Coronet magazine (Jan., 1960, p. 136) described him as "one of the nation's most outspoken advocates of capital punishment."

In the second place, when this statement was published petitioner was not under arrest for, nor charged with, the murder. Her name was not mentioned in the statement. It was yet to be determined who would be charged with being the perpetrators of the murder much less who, if anyone, would ultimately be convicted thereof.

Certain it is that not every person who read the statement of the District Attorney was persuaded to his point of view regarding capital punishment. The only reactions received by the newspaper to the published statement were protests against it as evidenced by published letters to the editor on December 24, 1958, December 30, 1958, and January 3, 1959. [Tr. of R. pp. 17-21.] Moreover, 23 of the 83 prospective jurors were excused on challenges for cause by respondent because of their conscientious scruples against the death penalty. Again, it is obvious that if those 23 persons read the

statement of the District Attorney, they were not in the least persuaded by it.

An article of December 30, 1958, in the Ventura County Star-Free Press set forth what purported to be the District Attorney's reasons why he would seek the death penalty as to petitioner and her co-defendants. (The fact that the article was not true is indicated by the issue of the same newspaper on February 24, 1959 [Ex. A-14 to Declar.; Tr. of R. (Moya Case) p. 66], reporting that the District Attorney had not even then stated whether he would seek the death penalty for petitioner.) However, respondent acknowledges that the truth or falsity of the publication is not in issue. The question is whether those who read the article would become legally biased so that they could not fairly try the petitioner. Whether any prospective juror concluded from reading the newspapers that the District Attorney would seek the death penalty against petitioner is immaterial because no prospective juror who came into the courtroom could possibly have failed to realize, when the examination of jurors began, that the District Attorney would seek the death penalty if petitioner were convicted. Each prospective juror was asked concerning his views with respect to capital punishment and those who had conscientious scruples against it were, in accordance with California law, excused on a challenge for cause by respondent. One would have to close his eyes to reality to believe that any prospective juror would conclude that the questions about capital punishment had no purpose whatever. Assuming that a prospective juror read and believed the article stating that the District Attorney would seek the death penalty against petitioner, how could that have adversely af-

fected petitioner when, in fact, the District Attorney ultimately did seek the death penalty against petitioner?

Petitioner seeks to leave the impression that purported comments from the District Attorney of Ventura County were more damaging than they otherwise would have been because Ventura County is a small, rural area (and presumably everyone knew the prosecutor). This Court can take judicial notice of the 1960 preliminary census figures. They show that of the more than 3,100 counties in the United States, Ventura County ranks in the upper 5% in population. Moreover, of the 34 prospective jurors asked by petitioner's counsel as to whether they knew the District Attorney, only two replied in the affirmative [Tr. of R. pp. 334, 491] and they did not serve as jurors.

Petitioner erroneously assumes not only that the District Attorney actually made the out-of-court statements attributed to him but also that it is misconduct for an attorney to make an out-of-court statement. The fact is that in California there is no rule of professional conduct prohibiting attorneys from making out-of-court statements. (See 34 Calif. S. B. J. 859 [1959] for a proposal that there be such a rule in California.)

Whether attorneys for the defendants in the three cases actually made out-of-court statements about the cases to newspaper reporters is unknown to respondent. However, the newspaper exhibits before this Court contain no less than 69 reports of out-of-court statements purportedly made by counsel for defendants to newspaper reporters. (See Appendix A.) Typical of the comments reported are those set out in Appendix B.

Petitioner complains that the press coverage of her trial "was intensified by camera coverage." Respond-

ent invites this Court's attention to the fact that it was the District Attorney who objected to courtroom photography and the petitioner and her counsel who wanted it. [Tr. of R. pp. 259-260.]

Even if, contrary to the facts and the California law, this Court concluded (1) that out-of-court statements were made by attorneys on both sides and (2) that the attorneys were guilty of misconduct in making them, it must be remembered that the proceedings in this Court are not for the purpose of disciplining attorneys by reversal of the judgments of the Supreme Court of California or by any other means. The sole question here is whether petitioner's conviction was had under circumstances depriving her of a fair trial.

Respondent does not understand petitioner's suggestion that the judgment should be reversed to "communicate this point [the impropriety of making statements to newspapers] to the public prosecutors" and "for its therapeutic value in this instance and its preventive effects in future cases" in the light of her admission that this Court should not "discipline prosecutors for misconduct by reversing judgments of conviction." These positions seem to be inconsistent. At any rate, respondent believes that if petitioner was deprived of a fair trial, the judgment should be reversed whatever the cause was and if she was not, the judgment should be affirmed.

C. Assuming That Some Published Report Would Cause Every Reader to Become Legally Biased, There Is No Proof That Any Juror Who Served Read That Report.

Obviously nothing that occurred outside of the judicial proceedings and prior to the trial could possibly have affected petitioner's right to an impartial jury un-

less the event which occurred prevented at least one of the twelve jurors who served from trying the case fairly and impartially. Petitioner claims that published reports did so. Even assuming that one or more of the publications would have caused every reader to become legally biased, petitioner has not shown that any juror read those particular reports.

It is true that most of the 83 prospective jurors had heard or read something about the murder of Olga Duncan. However, despite the fact that there were 63 days between the date of the first newspaper exhibit relied upon by petitioner (December 15, 1958) and the start of petitioner's trial (February 16, 1959), only the following newspaper issues (or clippings therefrom) are in the record in petitioner's case:

Ventura Star-Free Press	20
Oxnard Press Courier	18
Los Angeles Examiner	1
Los Angeles Times	5
Los Angeles Herald Express	4

No juror was shown to have read the Los Angeles Examiner or the Los Angeles Herald Express. Jurors Arend and Gosney usually read the Los Angeles Times, but whether they read any of the issues in the record was not disclosed. [Tr. of R. pp. 308, 325.] Jurors who ordinarily read the Ventura Star-Free Press were Osborne [Tr. of R. p. 300], Newhart [Tr. of R. p. 486], Bartels [Tr. of R. p. 504], and Missimer [Tr. of R. p. 594]. It was not shown what newspapers Jurors Gramckow [Tr. of R. pp. 549-555], Calhoon [Tr. of R. pp. 611-616], Berch [Tr. of R. pp. 629-637], Dewey [Tr. of R. pp. 650-657], or Horrell [Tr.

of R. pp. 665-671] read, much less whether any of them read any particular issue now in the record.

It is a well-known fact that most persons read newspapers only sketchily. Mr. Justice Frankfurter is quoted as saying: "Very few people ever read anything except the headlines." Philips, Felix Frankfurter Reminisces, p. 169 (1960). This is borne out by the examination of the twelve jurors who served and respondent respectfully invites the Court's attention to the cited portions of the record containing the examination of these jurors as to what they read and what they remembered about the case.

Even assuming that some particular report in one of the newspaper exhibits in this case is deemed by this Court to be so damaging that anyone who read it would necessarily thereafter be unable to be fair to petitioner, the record is completely barren of any showing that any juror read the report. With respect to the alleged quotations of the District Attorney, for example, the record shows that only Jurors Osborne [Tr. of R. p. 301] and Hall [Tr. of R. p. 646] had read any statement purportedly made by the District Attorney, but the nature of what they read was not asked by appellant's counsel.

The law in this situation is clear. In *People v. Chapman*, 93 Cal. App. 2d 365, 372, 209 P. 2d 121, 124 (1949), defendant claimed that a pre-trial newspaper article was so damaging that he could not be fairly tried in Alameda County. The appellate court rejected his claim with the observation that "there is no evidence that any newspaper reports were read by any member of the jury. . . ." This Court denied certiorari. *Chapman v. People*, 338 U. S. 943, 94 L. Ed. 581, 70 S.

Ct. 423 (1950). In *People v. Cook*, 39 Cal. 2d 496, 499, 247 P. 2d 567, 568 (1952), defendant claimed "that prior to the trial the district attorney aroused the prejudice of the people against him by making speeches about the case over the radio and at various civic meetings." Defendant's claim of lack of fair trial was rejected by the Supreme Court of California with the observation that "there is no evidence that any of the jurors who tried the case heard the speeches which were assertedly made."

If this Court believes that some particular article or articles would necessarily cause a reader to become legally biased against petitioner, respondent is at a loss to know how this Court can find that any juror read the offensive matter.

D. Assuming That at Least One Juror Became Legally Biased by What He Read, There Is No Proof That He Retained That Bias at the Time of Trial.

The newspaper articles in petitioner's case were published between December 15, 1958, and February 2, 1959. Petitioner's trial began February 16, 1959. Even if this Court finds that one of those articles was so inflammatory that every reader would necessarily be influenced, consciously or unconsciously, to desire to find petitioner guilty regardless of the evidence and even if this Court finds (despite the complete absence of any showing in the record) that some juror read that article, the question still remains whether the juror retained that bias to the time of trial.

California recognizes that the fact that a whole community is aroused against a defendant by newspaper publications some time prior to trial is no proof that a

fair and impartial jury cannot be obtained from that community at a later date *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924), (offensive publication 17 days before trial); *People v. Hall*, 220 Cal. 166, 30 P. 2d 23 (1934), (18 days); *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161 (1888), (three weeks); *People v. Suniga*, 128 Cal. App. 2d 738, 275 P. 2d 914 (1954), (three weeks); *People v. Mendes*, 35 Cal. 2d 537, 219 P. 2d 1 (1950), (three months); *People v. Burwell*, 44 Cal. 2d 16, 279 P. 2d 744 (1955), (four months).

E. Two California Courts Held That the Published Reports Would Not Make It Impossible to Obtain a Fair Jury.

Under California law the trial judge is required to grant a motion for change of venue if "a fair and impartial trial cannot be had in the county" where the case is pending. Cal. Penal Code, §§1033, 1035. Petitioner made such a motion on February 16, 1959, supported by the aforementioned newspaper exhibits, but petitioner's counsel did not argue the motion. [Tr. of R. p. 30.] The motion was denied without prejudice to renewing it again after examination of the prospective jurors. [Tr. of R. p. 30.] It was renewed on February 20, 1959, again practically without argument by petitioner's counsel, and denied. [Tr. of R. pp. 672-676.] The trial judge said:

> "I am thoroughly convinced that this jury, as constituted at the present time, will give to this defendant an absolutely fair and impartial trial and therefore the motion for change of venue is denied." [Tr. of R. p. 676.]

The trial judge thus did not believe, before the examination of the jurors, that prospective jurors who read the newspapers would thereafter not be able to give petitioner a fair trial. The trial judge was obviously convinced, after the examination of the jurors, that the particular twelve jurors who sat in the box would be able to give petitioner a fair trial irrespective of what any of them may have read or heard about the case. The Supreme Court of California was asked by petitioner to rule that the trial judge was wrong in this conclusion. Instead, that court affirmed the rulings of the trial judge denying the motions for change of venue. *People v. Duncan,* 53 Cal. 2d 803, 350 P. 2d 103 (1960).

The California Supreme Court is well aware of the requirement that trial be had before impartial jurors. In *People v. McKay,* 37 Cal. 2d 792, 236 P. 2d 145 (1951), the trial judge denied a motion for change of venue. Defendants' convictions by a jury were reversed by the Supreme Court for failure of the trial judge to order a change of venue. The court said:

> ". . . However conscientious the members of the jury may have been, it cannot reasonably be concluded that they could so divorce themselves from their past experiences and present surroundings that a fair and impartial trial could be had."

Eight California judges (the trial judge and seven Justices of the Supreme Court) examined the newspapers now before this Court and not one found that the newspaper articles were such as to prevent prospective jurors from being fair. These views should be entitled to great weight in this Court.

F. Petitioner at the Trial Did Not Believe That Any Juror Was Legally Biased.

Eighty-three prospective jurors were examined in petitioner's case. This is not a large number for a capital case. There were, as heretofore stated, three possible issues which the jury might be required to determine: guilt, penalty, and sanity. Petitioner's counsel asked no questions whatever regarding any bias which any juror might have on the issues of sanity or penalty. Petitioner's counsel did inquire with respect to opinions prospective jurors had on the issue of guilt and less than half (40) had formed opinions from what they heard or read. Of these 40, only 17 were found to be of such a frame of mind that they could not decide the case on the evidence notwithstanding their opinions. All of these 17 were excused on challenges for cause by petitioner. Almost all of the remaining 23 were excused for one reason or another. Three of the 12 jurors who were sworn to try the case had opinions on the issue of guilt, but petitioner did not challenge a single one of them for cause or for any other reason!

A ground of challenge to a juror is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." Cal. Penal Code, §1073. Petitioner was well aware of this ground because she invoked it 28 times and, except as to prospective jurors who were otherwise excused, the trial judge sustained all of her challenges except as to six prospective jurors all of whom were subsequently excused on peremptory challenges. Thus respondent re-

peats and emphasizes that not one person who ultimately served as a juror was challenged by petitioner for bias or for any other reason. Certainly this is extremely strong evidence of petitioner's then belief that neither the newspaper articles nor anything else resulted in any juror being legally biased, partial or prejudiced.

G. Summary.

In *Stroble v. California*, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 (1952), this Court was considering a California murder conviction which was preceded by intense newspaper publicity. Petitioner there had been described in the newspapers as a "werewolf", a "fiend" and a "sex-mad killer". His confession had been released by the District Attorney who also announced to the press his belief that petitioner was guilty. In finding that petitioner was not deprived of a fair trial, this Court said:

> ". . . Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."

In the case at bar there is no affidavit that any juror was in fact prejudiced. Most of the newspaper ac-

counts of which petitioner complains were published at least six weeks before the beginning of petitioner's trial. No hostile acts or other facts were shown which indicated any community, as opposed to individual, prejudice against petitioner. Neither petitioner nor the victim was a resident of the county of trial and all of the events concerning petitioner's plot to kill the victim took place in the neighboring county of Santa Barbara. Petitioner points to no statement of fact in any newspaper story which was not borne out by the evidence introduced at her trial. Petitioner never confessed and there was never any publication falsely stating that she had confessed. On the contrary, the newspapers consistently quoted her and her attorney as denying her guilt.

In *United States v. Handy*, 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965 (1956), petitioner claimed he had been deprived of a fair trial by newspaper publicity. This Court said:

> ". . . [P]etitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. . . . [W]e are asked to read the news reports and the testimony as to other incidents and to find, contrary to the Supreme Court of Pennsylvania and two federal courts, that these reports and incidents did create such an atmosphere that it infected the jurors and deprived petitioner of a fair trial on the evidence presented to them. We see no justification in the record to warrant our so finding."

In the case at bar, the record affirmatively shows that all of the jurors selected said that they could and would be fair and impartial notwithstanding what they read and that petitioner believed the jurors because she did not challenge a single one for cause. The Supreme Court of California held that the newspaper accounts were not such as to have required the trial judge to have granted her motions for change of venue.

In order to reverse the judgment, this Court would have to do the following things:

1. Find that one or more of the newspaper articles were so inflammatory that every reader would be prejudiced against petitioner.

2. Find that at least one juror read the particular articles deemed to be offensive.

3. Find that the prejudice thereby engendered in that juror continued from the date of reading to the date of trial.

4. Find that the juror falsely stated under oath that he could and would give petitioner a fair trial.

5. Find that petitioner's failure to challenge any juror is of no significance.

Respondent submits that there is nothing in the record which would support such findings.

Respondent does not claim that the publicity did not result in some prospective jurors becoming legally biased. It obviously did because 17 prospective jurors admitted that they had fixed opinions. But respondent does claim that from the fact that some persons become biased, it does not follow that all others must neces-

sarily be likewise biased. Not all persons are persuaded to identical conclusions by the same article or the same speech.

The newspaper publicity in the case at bar admittedly gave rise to the opportunity for some prospective jurors to form fixed opinions as to petitioner's guilt. But as Mr. Justice Holmes, writing for this Court, stated in *Holt v. United States*, 218 U. S. 245, 251, 54 L. Ed. 1021, 1029, 31 S. Ct. 2 (1910), "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

What was recently said in *Irvin v. Dowd*, 271 F. 2d 552, 554-555 (C. A. 7th Cir., 1959), certiorari granted 4 L. Ed. 2d 542 (1960), is appropriate:

> ". . . It is not surprising that, the more extensive the news coverage of a crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form impressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United States, is long ignorant of the details of crimes committed in any state (or in this country), un-

less he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances.

"Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before an unbiased judge and a jury is selected in accordance with established principles applicable to such a case. If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of criminal acts, followed by the usual publicity, actually immunizes the offender from prosecution. We reject such a conclusion as the law of this circuit."

It is of particular significance that in the present case nothing that appeared in the newspapers was not brought out during the trial. If the newspapers had published some particularly damaging facts about petitioner which either were not or could not have been

introduced as evidence at the trial, the possibility of prejudice would have been increased. Similarly, if the newspapers had published an untrue report that petitioner had confessed, the possibility of prejudice would have been increased. But here this Court must determine whether petitioner was deprived of a fair trial by pre-trial newspaper accounts of facts all of which (together with many more) the jurors ultimately heard from witnesses.

If such accounts are held to deprive an accused of a fair trial, then a large step in the indirect censorship of the press will have been taken. Public officers will conceal all information from the press (even though experience demonstrates that many crimes are solved and many wanted criminals are located through news items) for fear that publication of the information would jeopardize the ultimate trial of the accused. California will be forced to change its laws so that transcripts of preliminary examinations and grand jury hearings, which are now public records, will be made secret. (Even so, enterprising newspapers could nevertheless jeopardize a trial by printing information about a crime obtained from lay witnesses and other non-public sources.) Except for holding the newspaper in contempt of court, this Court will have for all practical purposes effectively forbidden the publication of facts about the most interesting, significant and important criminal cases in this country. (Obviously, the minor, routine, unimportant cases get little or no publicity.)

It is no answer to say that where newspapers have given intensive publicity to a case, the trial should be delayed or moved to a different county. If the case is of widespread interest, the same publicity can be ex-

pected even though the trial takes place at a different time or place from that originally scheduled. Neither is it any answer to say that if the trial takes place as scheduled, a new trial should be granted. Again, it is naive to believe that similar publicity would not accompany the new trial.

When, as here, there is no editorializing, no demands for a particular result, no slanting of the news, no untrue statements, no publication of inadmissible facts and when, as here, the publicity does not result in any threat of violence, display of emotions or other conduct indicating an inflamed community, then the mere extensive news coverage should not be held to have deprived a defendant of a fair trial.

Finally, one important distinction should be noted between the case at bar and cases arising from federal trial courts. In *Marshall v. United States,* 360 U. S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959), newspaper articles read by jurors during the trial were held to be so prejudicial that a new trial was granted by this Court. However, this Court acted in the exercise of its "supervisory power to formulate and apply proper standards for enforcement of criminal law in the federal courts". It did not invoke the Due Process Clause (of the V Amendment). While this Court undoubtedly would invoke the Due Process Clause (of the XIV Amendment) to reverse a state conviction if pre-trial publicity actually deprived a defendant of a fair trial, it has never done so. Respondent submits that there is less basis for doing so in the instant case than in other cases which have been before this Court.

II.

Was There a Violation of Petitioner's Right to a Fair Trial, as Guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, Where in a Trial of a Capital Offense by Jury, the Trial Court Permitted to Remain in the Jury Box and Sit in Judgment, Three Jurors Who Had Entered the Jury Box With Fixed Opinions as to Petitioner's Guilt, and Retained Such Opinions While Being Examined on Voir Dire?

If this is in fact the question at issue, and if it has not been waived by the failure of petitioner to raise it below, then it must be answered in the affirmative and the decision reversed. A "fixed opinion" is one that is "firm", "set", or "immovable". See Webster's International Dictionary. A person holding a "fixed opinion" is one who is not capable of judging a case solely on the evidence presented and according to the instructions of the court, and therefore is not a qualified juror. See 31 Am. Jur., Jury §212 (1958). But the mere designation by the petitioner of the opinions of three jurors in this case as "fixed" does not make them "fixed". See *United States v. Titus*, 210 F. 2d 210, 213-214 (C. A. 2d Cir., 1954) (dictum). To the contrary each of these three jurors (Berch, Hall and Harrell) stated under oath on *voir dire* that his opinion would be set aside and would not affect his decision. [Tr. of R. pp. 636, 648, 671.]

Therefore, respondent understands the real question here to be whether or not there was a violation of petitioner's right to a fair trial as guaranteed by the federal constitution when among the twelve jurors there

were three jurors who entered the jury box with opinions as to petitioner's guilt, who stated on *voir dire* that they would disregard their opinions and decide the case solely on the evidence, and who were never challenged for cause by the petitioner.

A. The Question as to the Bias of the Three Jurors Was Never Raised Below and Therefore Is Not Properly Before This Court.

On the jury panel, as it was finally constituted, there remained three jurors, Berch, Hall and Horrell, who had testified on *voir dire* that prior to the trial they had formed opinions concerning the guilt of the accused. [Tr. of R. pp. 635, 647, 670.] These jurors were subjected to intensive questioning by counsel for the petitioner to determine the nature of these opinions and the ability of each juror to set them aside. [Tr. of R. pp. 629-736, 641-648, 666-671.] At the conclusion of this questioning petitioner's counsel was obviously satisfied that these jurors would render an impartial verdict based solely on the evidence presented at the trial. Thus, each of them was *expressly* passed for cause without challenge. [Tr. of R. pp. 637, 648, 671.]

Now, for the first time, petitioner wishes to challenge these jurors for bias on the basis of the answers which were made on *voir dire*. This issue was not even presented to the Supreme Court of California, for there the only questions as to the qualifications of prospective jurors were in regard to four individuals who in fact did not hear the case. (See App. Op. Br. pp. 11-29; App. Reply Br. pp. 1-19. The Brief *Amici Curiae* in support of Appellants did not treat the issue.)

The California Legislature has made express provision with regard to the time for taking challenges to individual jurors. Section 1068 of the California Penal Code provides:

> "Challenge, When Taken. It must be taken when the juror appears, and before he is sworn to try the cause; but the Court may for cause permit it to be taken after the juror is sworn, and before the jury is completed."

The California courts have consistently held that no objection may be taken after the prescribed time, whether the challenge be peremptory or for cause. *People v. Sanford*, 43 Cal. 29, 31-32 (1872); *People v. Stonecifer*, 6 Cal. 405, 410-411 (1856) (specifically overruling a prior inconsistent case); *People v. Meehan*, 124 Cal. App. 2d 589, 593, 269 P. 2d 70, 72-73 (1954); *People v. Kerr*, 113 Cal. App. 2d 90, 94, 247 P. 2d 927, 929 (1952); *People v. Young*, 21 Cal. App. 2d 423, 427-428, 69 P. 2d 203, 205 (1937); *People v. Marconi*, 118 Cal. App. 683, 690-691, 5 P. 2d 974, 977 (1931); *People v. Cross*, 64 Cal. App. 443, 445, 221 Pac. 684 (1923).

It has been held specifically that a challenge to a juror on the ground that he had formed an opinion prior to the trial of the cause is waived if the objection is not raised at the proper time, *People v. Cross, supra*, even when it is alleged that that juror's opinion was so fixed that he could not set it aside and base his decision solely on the evidence presented at the trial. *People v. Young, supra.*

The reason for this rule is evident: "An accused cannot be permitted to accept a jury, remain silent in.

the face of claimed irregularities in its selection and impanelment, speculate on obtaining a favorable verdict, and then . . . [after conviction] challenge those claimed irregularities. . . . If an accused omits at the proper time to interpose his objections to any irregularities, he is deemed to have waived them." *People v. Kerr, supra; People v. Sanford, supra.* Otherwise, defendants in all criminal cases would be encouraged to approve of one juror on the panel whose qualifications could later be challenged for this would assure defendant of a new trial in case of conviction.

The only conceivable argument available to petitioner is that by denying challenges for cause taken against four prospective jurors, Porter, Saavedra, Flynn and Behrens [Tr. of R. pp. 283, 296, 412, 479], all of whom were removed by peremptory challenges [Tr. of R. pp. 430, 414, 462, 500], the trial judge conclusively demonstrated that similar challenges for cause would be futile.

Such an argument has no basis in fact in the present case. Section 1076 of the California Penal Code provides in part that:

> ". . . . [N]o person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; *provided,* it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." (Emphasis added.)

It is clear from this that the trial judge must decide the question of bias separately for each juror, and that this can only be done by a careful evaluation of the prospective juror's statements and of his demeanor. As the Supreme Court of the United States said in *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244, 247 (1878):

> ". . . In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words."

It seems obvious that the fact that the trial judge believed certain statements of prospective jurors Porter, Saavedra, Flynn and Behrens could have no bearing on whether or not he would believe similar statements made by jurors Hall, Berch or Horrell. This is clearly illustrated by the fact that the trial judge did uphold numerous challenges for cause made by petitioner's attorney. Of a total of 28 prospective jurors so challenged, 18 were dismissed on petitioner's own challenges. (These persons were Campbell [Tr. of R. p. 194], Keller [Tr. of R. p. 200], Holt [Tr. of R. p. 203], Holzer [Tr. of R. p. 212], Carmack [Tr. of R. p. 213], Hunt [Tr. of R. p. 216], Baradat [Tr. of R. p. 222], Boynton [Tr. of R. p. 227], Eads [Tr. of R. p. 232], King [Tr. of R. p. 257], Hawkins [Tr. of R. p. 337],

Fenner [Tr. of R. p. 352], Dodson [Tr. of R. p. 373], Bourne [Tr. of R. p. 456], Hall [Tr. of R. p. 528], Sollen [Tr. of R. p. 604], Dodds [Tr. of R. p. 627], and Young [Tr. of R. p. 665]. References are to the pages where the rulings of the trial judge appear.) Four others were excused by stipulation or on a challenge by respondent. (These persons were Knutson [Tr. of R. p. 439], Gisler [Tr. of R. p. 453], Morgan [Tr. of R. p. 471], and Wayman [Tr. of R. p. 590].)

The court denied petitioner's challenges to the other six prospective jurors. (These persons were Porter [Tr. of R. p. 283], Saavedra [Tr. of R. p. 296], Flynn [Tr. of R. p. 412], Behrens [Tr. of R. p. 479], Johnson [Tr. of R. p. 537], and Bushman [Tr. of R. p. 566].) It is important to note, however, that with respect to two of these six persons, Porter and Saavedra [Tr. of R. pp. 283, 296], petitioner's counsel, after the court's rulings, apparently withdrew his challenges by specifically passing for cause. He did not do so with respect to the other four.

The court's ruling as to prospective juror Dodds is of particular interest. The latter admitted on *voir dire* that she had formed an opinion of the merits of the case prior to trial. [Tr. of R. p. 623.] However, she went on to testify that she could set aside her opinion and render a verdict solely on the evidence to be presented and in accordance with instructions from the court. [Tr. of R. pp. 624-627.] Nevertheless, the court upheld a challenge for cause by defense counsel. [Tr. of R. p. 627.] It is important to note that this occurred *after* the denial of the challenge for cause to prospective jurors Porter, Saavedra, Flynn and Behrens

but *prior to* the examination of jurors Hall, Berch and Horrell. In view of this it can hardly be claimed that challenges to the latter three jurors would necessarily have been in vain. See also Tr. of R. pp. 193-194, wherein the court, over the opposition of the District Attorney, upheld a challenge for cause to prospective juror Campbell because of the latter's opinion, despite the fact that he stated he could and would try the case solely on the evidence presented.

That the issue of bias is one to be determined on an individual basis with respect to each prospective juror is recognized by the petitioner. She lists factors other than the pre-trial opinions of the jurors which she alleges fortify her contention that the jurors could not be impartial. For example, petitioner points out that on *voir dire*, juror Hall stated that a dear friend of hers had been recently murdered, that her sister was a policewoman and that her father had been a policeman in California. Certainly the petitioner cannot seriously contend that the court's determinations with respect to prospective jurors Porter, Saavedra, Flynn and Behrens made it futile to challenge juror Hall with respect to these additional factors.

The only conclusion that one can draw is that petitioner's counsel, after interrogating these jurors thoroughly, satisfied himself that they would determine the case fairly and impartially, and that there was no need to call upon the court to make a ruling as to bias. This is substantiated by the fact that petitioner on appeal never claimed that these three jurors would have been challenged for cause except that such a challenge would have been in vain.

Time and again this court has held that it will not entertain a constitutional issue in a case arising from a state court unless that issue was properly raised below, in the right court at the right time in accordance with state procedural rules. *Edelman v. California*, 344 U. S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (1953); *Stembridge v. Georgia*, 343 U. S. 541, 96 L. Ed. 1130, 72 S. Ct. 834 (1952); *Parker v. Illinois*, 333 U. S. 571, 92 L. Ed. 886, 68 S. Ct. 708 (1948); *Herndon v. Georgia*, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1935); *Brown v. Massachusetts*, 144 U. S. 573, 36 L. Ed. 546, 12 S. Ct. 757 (1892); see Stern & Gressman, Supreme Court Practice, (2d ed. 1954); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland, ed. 1951), §§66, 70, 75.

Thus, under state law, if a constitutional issue not properly interposed at the trial level is considered waived and for that reason is not heard by the state appellate courts, the Supreme Court of the United States will not hear it either. *Stembridge v. Georgia, supra; Brown v. Massachusetts, supra.* Similarly, even if a federal constitutional issue arises at the trial level, failure to pursue the question on appeal in the manner prescribed by state law may constitute a waiver of the issue and eliminate the possibilities of Supreme Court review. *Parker v. Illinois, supra; Herndon v. Georgia, supra.*

In the case at bar not only were the three jurors not challenged for cause at the trial, but no attempt was made on appeal to raise the question as to the constitutional validity of their presence on the jury. Even the petition for rehearing to the Supreme Court of California was devoted solely to the qualifications of prospective jurors Porter, Saavedra, Flynn and Behrens. (Pet. for Rehrg., pp. 8-11.) Obviously, since the issue was never raised below, this court has no choice but to dismiss this issue from its consideration.

B. The Jurors Who Actually Tried the Cause Were Impartial and Unbiased.

Section 1076 of the California Penal Code provides:

> "In a challenge for implied bias, one or more of the causes stated in section one thousand seventy-four must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section one thousand seventy-three must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; *provided*, it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the phonographic reporter."

This provision is not unique to California. In fact, there are 23 states which have statutes that are substantially the same.[2] One state has adopted such a provision by court rule[3] and at least 20 other states have adopted it as a rule of common law or statutory interpretation.[4] The Supreme Court of the United States first approved of the rule in *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244 (1878), *supra*, and it has been the law in the federal courts ever

---

[2]Alaska Comp. Laws Ann. § 55-7-48 (1949); Colo. Rev. Stat. Ann. c. 78-5-3 (1953); Fla. Stat. Ann. § 913.03(10) (1941); Ill. Rev. Stat. c. 78, § 14 (1959); Ind. Stat. Ann. § 9-1504 (1956); Ky. Crim. Code § 209 (1959); La. Rev. Stat. § 351(1) (1950); Miss. Code Ann. § 1763 (1942); Mo. Rev. Stat. §546.-150 (1949); Mont. Rev. Code Ann. Tit. 94-7122 (1947); Mich. Stat. Ann. § 28.1033 (1954); No. Dak. Rev. Code Tit. 29-1738 (1943); Nev. Rev. Stat. c. 175.115(2) (1959); Neb. Rev. Stat. § 25-1636 (1943); N. Y. Code Crim. Proc. § 376(2); Ore. Rev. Stat. § 17.445 (1959); Ohio Rev. Stat. Ann. § 2945.25(B) (Page 1954); So. Dak. Code Tit. 34.3620 (Supp. 1960); Tenn. Code Ann. § 40-2507 (1956); Texas Code Crim. Proc. art. 616(13), 632; Utah Code Ann. Tit. 77-30-21 (1953); Wash. Rev. Code Tit. 10.49.040 (1959) (which refers to Tit. 4.44.190); Wyo. Stat. § 7-225 (1957).

[3]Ariz. Rule of Crim. Proc. 220.

[4]*Willingham v. Alabama*, 262 Ala. 550, 80 So. 2d 280 (1955); *Sneed v. State*, 47 Ark. 180, 1 S. W. 68 (1886); *State v. Laudano*, 74 Conn. 638, 51 Atl. 860 (1902); *Johnson v. State*, 209 Ga. 333, 72 S. E. 2d 291 (1952); *Territory of Hawaii v. Robello*, 20 Hawaii 7, 15-18 (1910); *State v. Anderson*, 33 N. W. 2d 1 (Iowa 1948); *Kansas v. Kornstett*, 62 Kan. 221, 61 P. 805 (1900); *Commonwealth v. Snyder*, 282 Mass. 401, 185 N. E. 376 (1933), aff'd. 291 U. S. 97 (1934); *Garlitz v. State*, 18 Atl. 39, 71 Md. 293 (1889); *State v. Winder*, 183 N. C. 776, 111 S. E. 530 (1922); *State v. Spencer*, 21 N. J. L. 196 (1846); *State v. Rodriguez*, 23 N. M. 156, 167 P. 426 (1917); *State v. Howard*, 17 N. H. 171, 186-195 (1945); *Fleming v. State*, 62 Okla. Crim. 446, 72 P. 2d 403 (1937); *Commonwealth v. Richardson*, 392 Pa. 528, 140 A. 2d 828 (1958); *State v. Mittle*, 120 S. C. 526, 113 S. E. 335 (1922); *McCue v. Commonwealth*, 103 Va. 870, 49 S. E. 623 (1905); *State v. Meyer*, 58 Vt. 453, 3 Atl. 195 (1886); *Burns v. State*, 145 Wis. 373, 128 N. W. 987 (1910); *State v. Toney*, 98 W. Va. 236, 127 S. E. 35 (1925).

since. See *Holt v. United States*, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2 (1910), *supra*; *Hoyt v. United States*, 273 F. 792, 799 (C. A. 2d Cir., 1921); *United States v. Titus*, 210 F. 2d 210, 213-214 (C. A. 2d Cir., 1954), *supra*, (dictum); *Merritt v. United States*, 264 Fed. 870, 875-876 (C. A. 9th Cir., 1920) (dictum); *cf. Thiede v. Utah*, 159 U. S. 510, 516, 40 L. Ed. 237, 241, 16 S. Ct. 62 (1895); *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708, 7 S. Ct. 614 (1887); *Dolan v. United States*, 116 Fed. 578, 582 (C. A. 9th Cir., 1902).

The reasons for this rule and the methods of its application are best explained in an often-quoted passage from *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244, 246 (1878), *supra*:

> ". . . The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact,

> and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

See also *Irvin v. Dowd,* 271 F. 2d 552, 554-555 (C. A. 7th Cir., 1959), certiorari granted 4 L. Ed. 2d 542 (1960), *supra.*

Petitioner does not attack the validity of the California statute. This is understandable in light of the cases which have consistently held that such statutes are constitutional. *Ex parte Spies,* 123 U. S. 131, 31 L. Ed. 80, 8 S. Ct. 21 (1887) (upholding the validity of a similar Illinois statute); *Hopt v. Utah,* 120 U. S. 430, 30 L. Ed. 708, 7 S. Ct. 614 (1887), *supra* (upholding a similar statute of the Territory of Utah); *Irvin v. Dowd, supra* (upholding the validity of a similar Indiana statute); *cf. Holt v. United States,* 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2 (1910), *supra.*

The question then can only be whether the statute has been so misapplied as to give rise to a constitutional claim. The fact that the question was never

raised at the trial in connection with the three jurors here involved makes it virtually impossible to speak in terms of the application of the statute, and thus fortifies the position that the issue is not properly before this court. (See pp. 28-36, *supra.*)

Nevertheless, assuming that a mythical challenge had been made and rejected, the record would clearly support that decision. Each of the jurors in question (Hall, Berch, and Horrell) with commendable candor admitted that he had formed an opinion of the case prior to trial. [Tr. of R. pp. 635, 647, 670.] And each was subject to intensive examination as to his ability to ignore that opinion and decide the case fairly and impartially. In all three cases this examination was conducted by the defense counsel, not by the prosecuting attorney. The results of the examination left no doubt that these three jurors were competent. In clear and unequivocable terms the jurors testified that their opinions would have no effect whatsoever with respect to their decision. (It is of absolutely no consequence when these opinions were formed or how long they were "retained," provided that they did not influence the verdict.) Each of the jurors in question was positive that he could render a fair and impartial decision. Juror Berch, when asked whether or not she herself would be willing to be tried by a jury of persons with her present frame of mind, answered in the affirmative, as did Juror Horrell with respect to a similar question assuming his wife was the defendant. Although Juror Hall was not asked that particular question, her answers to other inquiries were just as convincing.

Petitioner, in her effort to show some error of constitutional proportions, attempts to distinguish among cases in which a prospective juror has only an "impression" and those in which he has an "opinion." Such a distinction is one of mere words and is valid only insofar as it reflects the effect of the "impression" or "opinion" on the mind of the juror. See, *e.g., State v. Hamilton,* 155 La. 1069, 99 So. 874 (1924); *United States v. Titus,* 210 F. 2d 210, 213-214 (C. A. 2d Cir., 1954), *supra* (dictum). In the last analysis, when a juror has stated that he can and will be fair and impartial despite an opinion, only the trial judge can decide whether that juror should be allowed to serve. Short of the most palpable error an appellate court cannot reverse such a determination. *Hopt v. Utah,* 120 U. S. 430, 30 L. Ed. 708, 710, 7 S. Ct. 614 (1887), *supra; Holt v. United States,* 218 U. S. 245, 248, 54 L. Ed. 1021, 1028, 31 S. Ct. 2 (1910), *supra.* Here the trial judge was not even asked by petitioner to make a ruling and the three jurors were thus "permitted to remain" by petitioner herself, not by the judge.

Petitioner, also places emphasis on the fact that the information upon which the jurors based their opinions may have come from discussions with other persons and not solely from newspapers or radio and television broadcasts. The source of information is of importance only to show the strength of the opinion and the effect which it will have on the juror's mind. Petitioner makes much of the fact that the persons with whom the jurors spoke were not shown not to have had personal knowledge of the case. There is not one shred of evidence that would suggest the existence of such personal knowledge, but petitioner alleges that the prosecution has the

burden of demonstrating that there is no prejudice, and, therefore, the conviction must be reversed.

In this regard there can be no question that the requirements of California law were met. As the California Supreme Court stated in *People v. Duncan,* 53 Cal. 2d 803, 815, 350 P. 2d 103, 109-110 (1960), with respect to the four prospective jurors unsuccessfully challenged for cause by petitioner:

> ". . . [Section 1076] was obviously enacted in recognition of the fact that some cases are given widespread publicity in advance of trial and that persons who may be called upon to act as jurors may read or hear what is reported, discuss the subject with others, and even form opinions as to the guilt of the accused. The statements of the four challenged jurors show that their opinions were based upon information obtained from newspapers, radio, or television and upon discussions with various people. There is nothing in the record to suggest that anyone with whom they talked had personal knowledge regarding the case, and their statements indicated they did not understand that these people had such knowledge. The crime was obviously a topic of conversation by the public generally, and such cases are usually discussed upon the basis of news reports and rumor. Only a few people speak from personal knowledge, and, when they do, that fact is almost invariably made clear. The trial court could conclude that the comments made by the persons with whom the four jurors discussed the case were founded on news reports or rumor."

More important, it is clear that the federal constitution places no burden of showing lack of prejudice on the prosecution. Every remote possibility of prejudice cannot be the basis of a reversal; otherwise the reasonable administration of criminal justice would be impossible. As Mr. Justice Holmes, writing for this Court, stated in *Holt v. United States,* 218 U. S. 245, 251, 54 L. Ed. 1021, 1029, 31 S. Ct. 2 (1910), *supra:* "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

In a more recent case, *United States v. Handy,* 351 U. S. 454, 462, 100 L. Ed. 1331, 1338, 76 S. Ct. 965 (1956), *supra,* this Court stated:

> ". . . While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' Adams v. United States ex. rel. McCann, 317 U.S. 269, 281, 63 S. Ct. 236, 87 L. Ed. 268, 276 [143 A. L. R. 435]. . . ."

Even if there were some burden on the prosecution to come forward with proof, that burden would have been satisfied, for each of the three jurors (Berch, Hall and Horrell) specifically testified that, insofar as he knew and believed, the persons with whom he had discussed the case had no personal knowledge of it but were themselves informed only through newspaper

reports or hearsay. [Tr. of R. pp. 635, 646, 669.] Of course the strength of these jurors' opinions and their ability to set them aside depends upon what they thought at the time the opinions were formed, and it is immaterial whether or not the persons with whom the jurors spoke had actual knowledge of the facts of the case. *People v. Potigian,* 69 Cal. App. 257, 261-262, 231 Pac. 593, 594 (1924).

The record speaks for itself: not only did defense counsel fail to challenge the three jurors for cause, but even if he had done so, a decision by the trial judge denying those challenges would have been upheld.

C. The Denial of the Challenges for Cause of Four Prospective Jurors Who Were Later Removed From the Jury Gives Rise to No Constitutional Question.

Respondent contends that any issue concerning prospective jurors who did not hear the case is not properly within the scope of the question as set forth by this court, since that question is limited to the qualifications of three jurors who were "permitted to remain in the box and sit in judgment."

But even if such an issue is to be considered, it affords no basis for reversal. What has been said as to the qualifications of Jurors Berch, Hall and Horrell applies to prospective Jurors Porter, Saavedra, Flynn and Behrens. Each of the latter admitted that he had formed an opinion of the merits of the case prior to trial [Tr. of R. pp. 277, 289, 407, 476], but each stated that his opinion could and would be ignored and that he would render his decision solely on the evidence presented. [Tr. of R. pp. 279, 291, 409, 478.] On the basis of these statements the trial court, under Section

1076, refused to dismiss these prospective jurors for cause. The Supreme Court of California reviewed the record and specifically upheld the rulings of the trial judge.

Petitioner urges that the trial court's decision was erroneous and that as a matter of law Section 1076 could not apply. There is no basis for such a contention. The trial judge was the only one to hear the testimony and evaluate it in light of each prospective juror's demeanor. The palpable error which would have been necessary for reversal by the Supreme Court of California simply was not present. The testimony of prospective juror Joseph T. Porter epitomizes the testimony of the other four jurors who stated they had opinions and who were later challenged for cause by the petitioner through the exercise of peremptory challenges. Porter stated that he had formed an opinion [Tr. of R. p. 277] and that his opinion was unfavorable to the defendant. [Tr. of R. p. 277.] He had read reports of the case in the local and metropolitan press. [Tr. of R. p. 276.] He had read articles which purported to be reports of the testimony of Augustine Baldanado before the grand jury [Tr. of R. p. 276] and of Luis Moya [Tr. of R. p. 276], and an article which purported to be a report of a confession by Luis Moya. [Tr of R. pp. 276-277.] He had heard radio and seen television broadcasts relating to the case. [Tr. of R. p. 277.] He was challenged for cause by the defendant [Tr. of R. p. 278] and that challenge was disallowed. [Tr. of R. p 283.]

In response to questioning on *voir dire* it became evident that, his existing opinion notwithstanding, he

could render a just verdict. The following questions and answers demonstrate this:

> "Mr. Gustafson: So that the opinion you have formed about Mrs. Duncan's guilt from what you have read in the newspapers would not be the governing factor and would not determine your verdict, would it?
>
> The Prospective Juror: No, sir.
>
> Mr. Gustafson: So you would be fair and impartial and would act upon the evidence and on what you heard in court?
>
> The Prospective Juror: Yes, sir."

[Tr. of R. p. 280.] Each of the other three prospective jurors was no less firm in his statements that he could set aside the opinion he had. No abuse of discretion, prejudicial or otherwise, is shown by the record but rather the record contains ample testimony to support the trial court's rulings in this matter, and on review the Supreme Court of California so held. *People v. Duncan*, 53 Cal. 2d 803, 813-816; 350 P. 2d 103, 108-110 (1960).

But assuming *arguendo* that the trial judge was incorrect in his factual determination and the Supreme Court of California was wrong, there is still no basis for reversal by the Supreme Court of the United States. Unless petitioner alleges and demonstrates that the trial judge was biased or incompetent, or that there was no evidence to support his conclusions, or that for some other reason petitioner was deprived of her federal constitutional rights, this Court has no power to reverse the decisions of the California courts. Just as this Court will not second-guess a jury, it will not re-

evaluate a factual determination by a judge, especially when that determination is in large part dependent upon the demeanor of the person who testified. See *Holt v. United States*, 218 U. S. 245, 248, 54 L. Ed. 1021, 1028, 31 S. Ct. 2 (1910), *supra; Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708, 710, 7 S. Ct. 614 (1887); *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244 (1878); *supra, Irvin v. Dowd*, 271 F. 2d 552 (C. A. 7th Cir., 1959), certiorari granted 4 L. Ed. 2d 542 (1960), *supra*.

As the court stated in *Buchalter v. People of the State of New York*, 319 U. S. 427, 430-431, 87 L. Ed. 1492, 1496, 63 S. Ct. 1129 (1943):

> "The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury such assertion raises no due process question requiring review by this court.
>
> "The petitioners insist that the rulings upon evidence and instructions to the jury, when taken in their totality, indicate that, whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court

of Appeals held that certain of the challenged rulings and instructions were erroneous but that the errors were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

There is no valid constitutional challenge in this case, and one cannot be demonstrated. Counsel for petitioner, in arguing his motion for a a new trial, specifically disclaimed any bias or prejudice on the part of the trial judge. [Rep. Tr. p. 93.]

The trial judge showed fully his sensitivity to the problem involved when he allowed the challenge for cause to prospective juror Dodd, after he had denied such challenges to Porter, Saavedra, Flynn and Behrens. [Tr. of R. p. 627; see also Tr. of R. pp. 193-194 with respect to prospective juror Campbell.]

The simple truth is that the jurors who actually heard and decided the case are shown by the record to have been fair, impartial and unchallenged. This is all that the Constitution requires. See *United States v. Wood*, 299 U. S. 123, 145-146, 81 L. Ed. 78, 88, 57 S. Ct. 177 (1936).

Conclusion.

The facts concerning the murder of Olga Duncan were most unusual. It was therefore only natural that the case attracted world-wide attention through news media. The evidence against petitioner at the trial was so strong that petitioner at no time has questioned the sufficiency of the evidence to support the verdicts as to either guilt or penalty.

This Court now asks whether petitioner was deprived of a fair trial. She obviously was not unless the publicity was such that one or more jurors had formed *fixed* opinions on the issues to be tried. The California Supreme Court put the matter succinctly: "Even if it be assumed that many persons formed opinions unfavorable to defendant as a result of what was published, it does not follow that persons without such views could not be found to act as jurors or that those who had adverse opinions would be unable to set them aside and try the case fairly on the basis of the evidence to be produced in court." *People v. Duncan*, 53 Cal. 2d 803, 812, 350 P. 2d 103, 108 (1960).

After examination of the jurors it was clear that there were nine who had formed no adverse opinions and there were three who would be able to set their adverse opinions aside and decide the case solely on the evidence. Petitioner did not challenge a single one of the twelve jurors. Her motion for a change of venue made after the twelve jurors were selected can only be interpreted as a claim that the nine jurors who said they had no opinions actually did have fixed opinions adverse to petitioner and as a claim that the three jurors who said they could and would set aside their opin-

ions actually could not or would not do so. These claims were rejected by the trial judge when he denied her motion. They were rejected by the Supreme Court of California when it upheld the trial judge's ruling.

Respondent respectfully submits that there is nothing in the record which warrants this Court finding that the jurors misstated their attitude and finding that the trial judge and the Supreme Court of California were wrong in believing that all of the jurors could and would fairly and impartially try the case.

Respectfully submitted,

STANLEY MOSK,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

BRUCE A. THOMPSON,
District Attorney,
County of Ventura,
Attorneys for Respondent.

ROY A. GUSTAFSON,
Of Counsel.

APPENDIX A.

Attorneys defending the three charged with the murder of Olga Duncan were: for Baldonado, John Danch; for Moya, Burt Henson; for Duncan, S. Ward Sullivan and Frank Duncan (the latter being formally made attorney of record on March 24, 1959). All are attorneys of record on this appeal.

For the convenience of this Court, the publications in this record in which it is reported that statements pertaining to the case were made out of court by attorneys for the defendants are here tabulated:

Date	Newspaper	Page	Exhibit	Attorney Quoted
2-22-1958	Ventura Star-Free Press	A-1	3	Sullivan
22	Los Angeles Times	25	30	Sullivan
22	Los Angeles Herald Express	A-4	10	Sullivan
23	Ventura Star-Free Press	A-1	16	Sullivan
23	Oxnard Press Courier	A-1	25	Sullivan
23	Los Angeles Times	1	31	Sullivan
24	Ventura Star-Free Press	A-1	17	Sullivan
24	Oxnard Press Courier	A-3	4	Sullivan
26	Oxnard Press Courier	A-1	26	Duncan
27	Ventura Star-Free Press	A-1	5	Duncan
27	Oxnard Press Courier	A-1	6	Duncan
27	Los Angeles Times	4	7	Duncan
29	Ventura Star-Free Press	A-1	9	Sullivan
29	Ventura Star-Free Press	A-1	9	Duncan
30	Ventura Star-Free Press	A-1	8	Sullivan
31	Ventura Star-Free Press	A-1	19	Danch
7-1959	Los Angeles Examiner	1	2	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
12	Ventura Star-Free Press	A-1, A-4	S-A p. 1	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Henson
12	Ventura Star-Free Press	A-1	S-A p. 1	Danch
13	Ventura Star-Free Press	A-1	A-1	Sullivan
20	Ventura Star-Free Press	A-1	A-3	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Danch
29	Ventura Star-Free Press	A-1	A-4	Sullivan
29	Ventura Star-Free Press	A-1	A-4	Henson
29	Ventura Star-Free Press	A-1	A-4	Danch
2– 2–1959	Ventura Star-Free Press	B-1	A-6	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Danch
14	Ventura Star-Free Press	A-1	A-7	Sullivan
16	Ventura Star-Free Press	A-2	A-9	Danch
16	Santa Barbara News Press	A-1	A-63	Duncan
17	Ventura Star-Free Press	A-4	A-11	Sullivan
17	Ventura Star-Free Press	A-1	A-11	Duncan
18	Ventura Star-Free Press	A-1, A-3	A-40	Sullivan
19	Ventura Star-Free Press	B-8	A-12	Sullivan
20	Ventura Star-Free Press	A-1	A-13	Sullivan
21	Ventura Star-Free Press	A-1	A-41	Sullivan
24	Ventura Star-Free Press	B-1	A-14	Sullivan
26	Ventura Star-Free Press	A-16	A-16	Duncan
26	Ventura Star-Free Press	A-1	A-16	Sullivan
26	Santa Barbara News Press	A-1	A-19	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
26	Los Angeles Times	32	A-84	Sullivan
27	Ventura Star-Free Press	A-1	A-43	Duncan
27	Ventura Star-Free Press	A-1	A-43	Sullivan
27	Los Angeles Examiner	1	A-62	Danch
27	Los Angeles Examiner	1	A-62	Duncan
3- 2-1959	Santa Barbara News Press	A-7	A-69	Sullivan
3	Ventura Star-Free Press	A-1	A-46	Sullivan
4	Ventura Star-Free Press	A-1	A-23	Sullivan
6	Santa Barbara News Press	A-8	A-20	Duncan
9	Ventura Star-Free Press	A-1	A-49	Sullivan
9	Oxnard Press Courier	A-1	A-86	Sullivan
9	Santa Barbara News Press	A-1	A-72	Sullivan
11	Los Angeles Examiner	1	A-32	Sullivan
16	Santa Barbara News Press	A-1	A-76	Sullivan
17	Ventura Star-Free Press	A-1, A-7	A-37	Duncan
17	Ventura Star-Free Press	A-1	A-37	Sullivan
21	Ventura Star-Free Press	A-1	A-36	Duncan
21	Ventura Star-Free Press	A-1	A-36	Sullivan
21	Oxnard Press Courier	A-1	A-35	Duncan
21	Oxnard Press Courier	A-1	A-35	Sullivan
21	Santa Barbara News Press	A-6	A-80	Duncan
21	Santa Barbara News Press	A-6	A-80	Sullivan
21	Los Angeles Examiner	1	A-34	Duncan
21	Los Angeles Examiner	16	A-34	Sullivan
24	Ventura Star-Free Press	A-1	A-59	Sullivan

APPENDIX B.

The nature of the reported statements by defense attorneys to newspapers is illustrated by the following excerpts:

"Frank later rapped what he called the political ambitions of the district attorney. 'There was no question that there was political ambition in this,' he said. 'He intends to climb to some higher position over my mother's body.'"

(p. A-1 Ventura Star-Free Press March 21, 1959, Ex. A-36.)

"Frank Duncan was barred yesterday from seeing his mother, Mrs. Elizabeth Duncan, now in county jail awaiting trial. . . .

"Duncan was visibly disappointed and angered by the refusal. He termed it 'extraordinary' and said it was 'uncalled for'. 'There is no justification for it,' he added. 'It smacks of the thumb and the screw—I mean, the rack and the screw.'

"Sullivan told newsmen that the bar to outside visitors would hamper preparation of his case. . . .

"He said he saw the 'handwriting' of District Attorney Roy A. Gustafson behind [Sheriff] Hill's orders yesterday. . . .

"[Duncan] said he had not read anything in any newspaper since last seeing his mother on December 20—six days before she was indicted in the slaying plot . . . to change his opinion of her innocence.

"'Just because she is accused does not mean she is guilty,' he said. . . .

"Sullivan and Duncan also revealed yesterday that shortly after the 31-year old attorney was born, his mother was in a sanitarium."

(p. A-1 Ventura Star-Free Press, January 12, 1959, Sullivan, Ex. A p. 1.)

"Defense Counsel Sullivan reported he was somewhat startled, when going into the jail to visit his client, to hear the jailer call out the name of a prisoner. 'Gustafson,' the jailer called. 'Gustafson, come here.'

"Sullivan stopped and said: 'Would you mind telling me the first name of that fellow?'

"No, it wasn't Roy A."

(p. B-1 Ventura Star-Free Press, February 24, 1959, Ex. A-14.)

"Frank Duncan leveled this blast at Gustafson: 'There is no question but that he intends to climb to some higher political position over the body of my mother! Never, as a lawyer, did I think I would see such hatred, bias and prejudice in any court in the United States.' "

(p. A-6 Santa Barbara News Press, March 31, 1959, Ex. A-80.)

"Her son Frank . . . told the News Press this morning he is sure that the woman charged with killing his young wife is innocent.

" 'After I read the complete Grand Jury transcript,' he said, 'I am fully convinced that my mother is innocent of the charge.' He also said he has 'the greatest concern' that she will not get a fair trial in Ven-

tura County, based on wide publicity given events which have gone before."

(p. A-1 Santa Barbara News Press, February 16, 1959, Ex. A-63.)

"District Attorney Roy Gustafson was accused of 'going a long way' to prejudice any jury that would hear the Duncan murder case.

"The accusation came from Mrs. Elizabeth Duncan's defense attorney, S. Ward Sullivan, who charged that Gustafson's public statements . . . using this case as an argument in favor of capital punishment are a very obvious effort to influence a verdict.

" 'His remarks,' Sullivan said, 'certainly will influence potential jurors in Ventura County. Gustafson is going a long way to see that these defendants do not receive a fair and impartial trial at the hands of an unbiased and unprejudiced jury.' "

(p. A-1 Ventura Star-Free Press, December 30, 1958, Ex. 8.)

"The following statement was handed to reporters by attorney Burt Henson this morning . . . 'One thing that troubles me about this case is the fact that the district attorney appears to be following a course of selective prosecution and selective retribution. It appears as though the district attorney is again deciding who is to be prosecuted and who shall be a target of retribution.' "

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Mr. Sullivan told the Press Courier just before court convened today that the district attorney has been guil-

ty of prejudicial conduct 'in offering what he knew or should have known was incompetent and irrelevent [*sic*] evidence, entered for the purpose of degrading and debasing my client in the eyes of the jury.'."

(p. A-1 Oxnard Press Courier, March 9, 1959, Ex. A-86.)

"Sullivan who talked for two hours to Mrs. Elizabeth Ann Duncan, 54, today, said tonight:

" 'I firmly belief that these two men maintained a bitter grudge toward the Duncan family and they resorted to murder in an attempt to blackmail this poor woman.' "

(p. 1 Los Angeles Times, December 23, 1958, Ex. 31.)

"Sullivan emerged from an hour and a half conference with Mrs. Duncan this afternoon to announce that he is convinced she is not guilty and that he will so plead her.

"He said he is convinced she had nothing to do with her daughter-in-law's disappearance and demise, but that he forsees [*sic*] a long trial, possibly two or three weeks."

(p. A-4 Los Angeles Herald Express, December 22, 1958, Ex. 10.)

"Duncan said . . . 'It's inconceivable that mother could associate with a man like that. It sounded like something that might be done in Chicago—not in Santa Barbara.

" 'What a cold-blooded man (Moya). I'd like to lay my hands on that————————————.' "

(p. 1 Los Angeles Examiner, February 27, 1959, Ex. A-62.)

"Sullivan said it appeared to him that Gustafson had done 'a good job in educating the people of Ventura County on his views of capital punishment.'"

(p. A-1 Ventura Star-Free Press, February 18, 1959, Ex. A-40.)

"Said Sullivan: 'This is the clearest case of a miscarriage of justice that I have ever tried in my more than 30 years as a trial lawyer. There is more glaring error in this record than in any case I have ever tried.' . . .

"Of his client he said, 'I don't think she comprehends what happened. All she knows is that she was tried before a biased and prejudicial jury.'"

(p. A-1 Ventura Star-Free Press, March 21, 1959, Ex. A-36.)

"Frank Duncan said he had been reared very carefully by his mother. 'She taught me always to stick up for the under dog, not to hurt anyone, particularly the helpless. She was a very sensitive person—she couldn't stand to see a chicken killed,' he said."

(p. A-1 Ventura Star-Free Press, December 27, 1958, Ex. 5.)

"S. Sullivan, prominent Los Angeles attorney, disclosed that Mrs. Duncan's defense will probably be that she was being blackmailed by Baldonado and Moya."

(p. A-1 Oxnard Press Courier, December 23, 1958, Ex. 25.)

"S. Ward Sullivan, Mrs. Duncan's attorney, said he would 'just as soon' have both Baldonado and Moya plead guilty.

" 'We would prefer to go to trial without those two,' Sullivan said."

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Frank Duncan had bitter comments after court about Moya's conversion. 'He claims to have religion now, yet he told about killing my wife with no more emotion than if he were ordering his lunch,' Frank said.

"He had said earlier it was inconceivable his mother could associate with a man like that."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan said he regards the Duncan case as one of the most interesting he has handled.

"He said his client has consistently stated to him that she is innocent. The main difficulty from a defense standpoint that he sees right now is in impaneling an impartial jury to try her.

"He feels statements by the District Attorney have seriously prejudiced the average Ventura County citizen against Mrs. Duncan."

(p. B-1 Ventura Star-Free Press, February 2, 1959, Ex. A-6.)

"Young Duncan greeted his mother again in the courtroom and took the opportunity to make several statements to the press. He said for one thing his mother, and other women prisoners in the county jail, are not allowed to read Ventura County newspapers on the belief they would obtain information concerning developments in cases in which they are involved.

"He also branded as 'hogwash' reports that his mother is accumulating a cache of sleeping pills and other drugs in her jail cell as a possible suicide preparation in case the murder trial goes against her."

(p. A-1 Ventura Star-Free Press, February 17, 1959, Ex. A-11.)

"Frank Duncan told reporters after the session that he did not learn of the phony annulment until many weeks after it was granted."

(p. A-16 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"S. Ward Sullivan, veteran criminal lawyer, said today he will enter a plea of 'not guilty' for Mrs. Elizabeth Duncan . . . 'She denies having any part of the killing of Olga Duncan,' Sullivan said.

"He said she admitted having met both Augustine Baldonado and Luis Moya who are believed to have committed the actual killing. . . .

"Sullivan said that 'she feels someone else is trying to involve her in the murder.' . . .

"Asked what the feeling was between the two women, the son's wife and the mother-in-law, Sullivan said that there was no indication of hatred on the part of Mrs. Duncan. 'She has told me however, that there was no love lost between them."

(p. A-1 Ventura Star-Free Press, December 22, 1958, Ex. 3.)

"The Los Angeles attorney said there are a great number of facts in the matter which have not as yet been presented and which he feels will place a new light on the whole proceedings. . . .

"Sullivan said his client is maintaining a calm attitude outwardly but that she has obviously been hard-hit by the aspects of the charges against her. 'She has lost 12 pounds since being placed in custody.' Sullivan said. 'She would, of course, rather be spending her holiday season with her son and friends than in jail.'"

(p. A-1 Ventura Star-Free Press, December 24, 1958, Ex. 17.)

"Sullivan has told reporters one of his arguments will be that all of the testimony against Mrs. Duncan is from people who were admitted accomplices in the crime of murder, and that the law requires independent, corroborative evidence from people who were not directly involved."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan contends all who have testified to details of the alleged murder scheme up to now have branded themselves accomplices by their own testimony."

(p. A-1 Ventura Star-Free Press, March 3, 1959, Ex. A-46.)

"Earlier, Mrs. Duncan's attorney, S. Ward Sullivan, said he will demand a mistrial in the four-week-old trial, citing what he called 'misconduct of the district attorney.' . . . '[H]e knows the jury cannot exclude these matters from their minds,' Sullivan said."

(p. A-1 Ventura Star-Free Press, March 9, 1959, Ex. A-49.)

"Young Duncan refused to say what he thought about his mother's involvement. . . .

" 'My mother would have to be insane to be linked into this . . .' he said."

(p. A-1 Oxnard Press-Courier, December 26, 1958, Ex. 26.)

"Sullivan said later he had talked to her [Mrs. Duncan] about the verdict. . . .

" 'She isn't surprised at the verdict,' he said, 'because she realizes she had to go to trial before a jury that was already biased and prejudiced, and she couldn't expect anything else from the outset of the trial.' "

(p. A-6 Santa Barbara News Press, March 21, 1959, Ex. A-80.)

"John Danch, Ventura attorney for Baldonado, said he expects the trial to take at least two weeks. He hopes the three defendants will be tried together, but anticipates Mrs. Elizabeth Duncan's attorney, S. Ward Sullivan, may seek a separate trial for his client.

"Danch says he feels it may be difficult to obtain an impartial jury in Ventura County."

(p. A-1 Ventura Star-Free Press, December 31, 1958, Ex. 19.)

"Sullivan said today Mrs. Duncan definitely will take the stand to testify in her own behalf, when the defense presents its case. Under the law, she cannot be required to do so."

(p. A-1 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"Baldonado's attorney, John Danch, Ventura, said he plans to advise the former Camarillo resident against making any admissions in the Duncan trial starting today."

(p. A-2 Ventura Star-Free Press, February 16, 1959, Ex. A-9.)